UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Rieth-Riley Construction Co., Inc.,
Employer,

and

Case Nos. 07-RD-257830
07-RD-264330

International Union of Operating Engineers,
(IUOE) AFL-CIO, Local 324,
Union,

and

Rayalan A. Kent,
Petitioner.

PETITIONER'S OPPOSITION TO LOCAL 324's MOTION TO THE BOARD TO REOPEN THE RECORD AND BRIEF IN SUPPORT THEREOF

Petitioner Rayalan Kent ("Mr. Kent") files this brief in opposition to International Union of Operating Engineers (IUOE) AFL-CIO, Local 324's ("Union" or "Local 324") Motion to Reopen the Record. This motion is meritless and is nothing more than an improper attempt to file an untimely brief on the merits of the Request for Review. The Board should deny the motion in its entirety.[1]

ARGUMENT

NLRB Rules and Regulations § 102.65(e) governs motions to reopen the record, and places the burden on the movant to meet several conditions for such a motion to be successful. Tellingly, Local 324 failed to even cite to this Section, instead incorrectly stating the Board "may grant a motion to reopen the record when a party presents newly discovered evidence that relates to

[1] For a recitation of the procedural and factual history, Mr. Kent refers the Board to his timely-filed Brief on the Merits in Support of Mr. Kent's Request for Review, pp. 1–5.

material issues in dispute where the motion is made promptly upon discovery." Union Mot. at 6. The Union created this standard out of whole cloth to suit its purpose of ensuring that no decertification election ever takes place in this bargaining unit. In doing so, Local 324 failed to meet the actual requirements set forth by the Board, and has wasted the Board's and opposing counsels' time as it attempts to delay balloting from ever occurring.

A. The applicable legal standard.

Only "because of extraordinary circumstances" is a party permitted to "move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record." NLRB Rules & Reguls. § 102.65(e)(1). However, "[n]o motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any Regional Director or Hearing Officer with respect to any matter which could have been but was not raised pursuant to any other section of these Rules." *Id.*

To establish extraordinary circumstances, "[a] motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited." *Id.* Yet not just any evidence will do. "Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing." *Id.*

In *Manhattan Center Studios, Inc.*, the Board clarified that a party seeking to reopen the record must establish: "(1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence." 357 NLRB 1677, 1679 (2011).

B. Local 324 lacks any "extraordinary circumstance" warranting a reopening of the record.

While a party can move to reopen the record "because of extraordinary circumstances," no such circumstances are present here nor does Local 324 even attempt to argue that such exist. NLRB Rules & Reguls. § 102.65(e)(1). Indeed, granting the Union's Motion would itself be an extraordinary circumstance for at least two reasons.

First, this is a "run of the mill" situation where a Region and union use ULP charges to block the decertification election that the employees the union represents petitioned for. These ULPs formed the basis of the Regional Director's wrongful dismissal of the employee's petitions that is now on appeal to the Board. Allowing Local 324 to reopen the record each time an alleged new fact arises in its separate ULP litigation would result in undue delay in resolving the pending decertification petition. This is the very type of delay the Board sought to end by promulgating its new election rules. *See* Repr.-Case Procedures: Elect. Bars; Proof of Maj. Supp. in Constr.-Industry Coll.-Barg. Relationships, 85 Fed. Reg. 63,18379 (Apr. 10, 2020) (codified at 29 C.F.R. pt. 103) (stating "the better policy protective of employee free choice is to eliminate blocking elections based on any pending unfair labor practice charge, even those that may ultimately be found to have merit" and "revising the blocking-charge policy to end the practice of delaying an election represents a more appropriately balanced approach to the issue of how to treat election petitions when relevant unfair labor practice charges are pending").

If the Union's Motion is granted, the Board would set a precedent that any request for review of a petition's dismissal is not justiciable until the ULP charges that "blocked" the elections are fully litigated. This cannot be the case, especially under the new election rules. Practically speaking, if any evidence introduced in a ULP proceeding is sufficient grounds to require the record to be reopened in a decertification case, no request for review of a decertification petition's

dismissal would ever be able to proceed until the ULP litigation was finished. Otherwise, a party could seek to reopen the record whenever a new filing occurred or new evidence was admitted in the ULP case, in derogation of any employees' rights to a speedy election under NLRA Section 9. The Board should refuse to allow such a "work-around" that delays resolution of the decertification petition and denies employees' Sections 7 and 9 rights.

Second, the Board's Rules and Regulations contemplate reopening the record *for a hearing*. NLRB Rules & Reguls. § 102.65(e)(1) ("A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing *or hearing de novo*." (emphasis added)); *see also id.* ("Only newly discovered evidence—evidence which has become available only *since the close of the hearing*—or evidence which the Regional Director or the Board believes s*hould have been taken at the hearing will be taken at any further hearing*." (emphases added)). Even in a case where the Board granted a motion to reopen the record to admit a piece of evidence, this was allowed in a case where a prior hearing had been held. *Nat'l Opinion Res. Ctr.*, 187 NLRB 583, 583 (1970) (granting motion to reopen to accept the parties' stipulation after the close of a hearing).

Here, the situation is much different. Not only has no hearing ever been held, but Mr. Kent was denied the ability to put on evidence at a hearing as the Regional Director unilaterally determined that no such hearing was warranted. Pet'r's Br. On the Merits, Ex. 2, Reg'l Dir. Dec. & Order at 8 ("find[ing] that there is no need for an evidentiary hearing to establish a causal relationship between the alleged unlawful conduct by the Employer and employee disaffection"). Mere hours before the ballot count, the Regional Director summarily dismissed both of Mr. Kent's decertification petitions without ever holding a hearing. *Id.* The Union had opposed Mr. Kent's multiple requests for a hearing in his first decertification petition and has continued to oppose Mr. Kent's Request for Review in its entirety—including the portion that alternatively asks the Board

to remand to the Regional Director for a hearing. *See* Union's Opp'n to Reqs. for Review (Nov. 29, 2020).

Now, Local 324 seeks to have the Board accept one-sided evidence without Mr. Kent having the ability to cross-examine the witness or enter any evidence of his own—at a hearing or otherwise. Granting such a motion would be a manifest injustice. If Local 324 believes the Board needs an evidentiary record to decide the case (which it does not), it should withdraw its opposition to Mr. Kent's Request for Review and consent to a hearing in this matter should the Board decide one is appropriate even in light of its new election rules. The Union cannot oppose a hearing where all sides have the opportunity to present evidence while at the same time seeking to reopen the record for the sole purpose of putting in evidence it deems favorable to its position.

C. Local 324's Motion Fails the Board's *Manhattan Center Studios* Test.

As noted above, the Board requires a motion to reopen the record under Section 102.65(e) to establish three things: (1) the evidence sought to be admitted existed but was unavailable at the time of the proceeding; (2) the evidence would have changed the outcome of the proceeding; and (3) the party promptly filed the motion once it discovered the evidence. *Manhattan Ctr. Studios, Inc.*, 357 NLRB at 1679.[2] The Board should deny Local 324's motion because it fails the first two conjunctive factors.

1. Local 324 improperly seeks to admit evidence that was available to it prior to the Regional Director's dismissal.

Local 324 claims it seeks to introduce newly-discovered evidence. Specifically, that Rieth-Riley gave unilateral two-dollar raises to its employees on June 1, 2019 and June 1, 2020 consistent

[2] The two substantive requirements refer to a "proceeding." As discussed, *supra*, the Regional Director summarily dismissed the decertification petition with no real "proceedings." As such, this test is inapplicable here and the Board should dismiss Local 324's motion on that basis alone. For purposes of this analysis, Mr. Kent will assume the "close of the proceeding" was the Regional Director's November 9, 2020 order dismissing his petitions.

with the multi-employer offer made in May 2018. Union Mot. at 3; *Id.*, Ex. 2 at 4.[3] In so doing, the Union asks the Board to "reopen the record and receive the evidence attached hereto." Union Mot. at 6. The attached evidence includes the entire transcript of Keith Rose's testimony given on February 18, 2021 (approximately 152 pages of transcript) as well as several additional documents. *See* Union Mot., Exs. 1–4.

Yet, the only evidence that the Board will consider on a motion to reopen the record is evidence that: (1) existed at the time of the proceeding and (2) that the Union had no knowledge of until after the proceeding ended. The Union's evidence fails on both accounts.

With respect to the first prong, Local 324 seeks to introduce at least one exhibit that did not exist when the Regional Director issued her November 9, 2020 dismissal, a February 20, 2021 e-mail indicating that Counsel for the General Counsel intends to ask the ALJ to allow an amendment to the ULP complaint at the next scheduled March 15, 2021 hearing date. Union Motion, Ex. 3. Any reliance on this e-mail is improper as it did not exist at the time of the proceeding and is mere speculation as to what will happen at a future hearing on a future date.

With respect to the second prong, the Union's arguments completely fall apart. It is not enough for Local 324 to allege that it did not have knowledge of the "new" evidence, but it also

[3] This evidence is being offered without Mr. Kent being able to cross-examine the witness or provide counter evidence, and with no ALJ credibility determination. Mr. Kent has reason to believe Rieth-Riley did not give its employees $2.00/hour raises in 2019 or 2020. Without a hearing, it is impossible for the Board to determine the veracity, credibility, or relative weight it should give this uncorroborated evidence. *Cablevision Sys. Corp.*, 367 NLRB No. 59, *5 n.13 (Dec. 19, 2018) ("[U]nless '[t]he General Counsel established, at a hearing, that there were ULPs and that there was a causal nexus between that unlawful conduct and the employee disaffection,' a decertification petition could not be administratively dismissed based on allegations that employer conduct caused the disaffection absent a hearing at which the parties to the representation case—including the decertification petitioner—could present evidence on the issue of taint. Moreover, a Regional Director's findings at such a hearing may be appealed to the Board." (quoting *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004)).

must prove that it was "excusably ignorant" of the evidence at the time it was required to act *Manhattan Ctr. Studios*, 357 NLRB at 1679. In other words, the Board asks "whether the movant has established that the evidence 'could not be discovered by reasonable diligence.'" *Id.* (quoting *API Logistics, Inc.*, 341 NLRB 994, 994 (2004)).

First, the Union was not "excusably ignorant" of the alleged wage increase evidence as it should have known about it, particularly the 2019 wage increase. The Union alleges that a wage increase occurred on June 1, 2019—two months prior to the start of its strike on July 31, 2019. Union Mot. at 3; Union Opp'n to Req. for Rev. at 3. If true, its own members would have received the wage increase before they went on strike. If Local 324 had exercised reasonable diligence, it would have discovered this wage increase by speaking with any one of the hundreds of employees it represents. Given that the Union's authority is derived from its membership, it is not unreasonable to conclude that reasonable diligence should include speaking to its members about the status of their working conditions.

Similarly, Rieth-Riley proposed 2019 and 2020 wage increases to the Union *in 2018*, and the Union claims that Rieth-Riley acted to increase the employees' wages pursuant to that very 2018 proposal. Union Mot. at 2–3. Local 324 surely knew about the 2018 proposal as it, and the 2018 raises, are the subject of one of its ULPs against Rieth-Riley. *See* Pet'r's Br. On the Merits, Ex. 11, Compl. ¶ 6 (Case 07-CB-234085); *see also* Union Mot., Ex. 1 at 1633:14–24 (Rose testifying that Rieth-Riley gave the offer to the Union in 2018). Given that Local 324 knew Rieth-Riley acted in accordance with the 2018 proposal, and should have known it continued to act in accordance with that proposal in 2019, the Union was on notice well before its Motion that Rieth-Riley was likely to continue to act in accordance with the 2018 proposal. At the least, the Union

should have discovered this information through reasonable diligence.[4] *See, e.g.*, *Alcoa Marine Corp.*, 240 NLRB 1265, 1265 n.1 (1979) (denying motion to reopen the record when the Board "was not satisfied that the evidence would not have been discovered by the exercise of due diligence").

Second, the evidence Local 324 belatedly seeks to admit regarding the allegedly "newly discovered" evidence of the aforementioned wage increases is broader than just the "newly discovered evidence." It not only is Mr. Rose's entire testimony but also is additional exhibits that clearly are not "newly discovered." These additional documents, found in Local 324's Exhibit 2, include:

- a letter *from the Union* dated February 21, 2018;
- an e-mail between the Union and MITA dated April 11, 2018;
- a letter to the Union, dated May 18, 2018; and
- the May 18, 2018 Multi-Member offer, which is the subject of a Union ULP against Rieth-Riley over the alleged 2018 wage increase, Pet'r's Br. On the Merits, Ex. 11, Compl. (Case 07-CB-234085).

These documents—all from 2018—were undoubtedly in the Union's possession before the proceedings began, and the Union makes no attempt to argue otherwise.

Moreover, Mr. Rose's testimony spans over 140 pages and covers many subjects outside of the "newly discovered" facts Local 324 argues should be admitted. Seeking to admit Mr. Rose's entire testimony is improper, as the Union's Motion cites to the transcript twice, referencing a total of only four pages. Union Mot. at 3 (citing to Ex. 1 at 1631–33, 1633–34). Indeed, the Union does not, nor could it, attempt to justify its request to include Mr. Rose's entire testimony.

[4] A plausible alternative is that Local 324 was reasonably unaware of the raises in 2019 and 2020 because the raises did not occur. *See supra*, n.3.

2. Local 324's alleged evidence, even if admitted, would not change the outcome of the proceeding.

In order to prevail, the Union must also demonstrate "that the evidence would have changed the result of the proceeding." *See, e.g., Brevard Achievement Ctr., Inc.*, 342 NLRB 982, 982 n.1 (2004) (denying motion to reopen the record because the petitioner failed to show the evidence would produce a different result); *Revere Copper & Brass Co.*, 172 NLRB 1126 n. 4 (1968) (denying petitioner's motion to reopen the record in light of a ruling in favor of petitioner). Local 324 has not even argued this point, and any attempt to argue this point now will likewise fail.

Mr. Kent's Request for Review highlights the legal error in the Regional Director's dismissal. Namely, the Regional Director erred in her consideration of the case under the old, *Master Slack Corp.*, 271 NLRB 78 (1984), standard; the Board's new blocking charge rules should apply to the petition; the election was properly held; and the ballots should have been counted. The scope of Mr. Kent's Request and the Board's Review, therefore, is limited to the legal issue of whether *Master Slack* should apply, rather than whether it was applied correctly. The facts the Union asserts in its Motion are irrelevant to the Board's consideration of this legal issue.

Even if the Board considers Local 324's *Master Slack* argument, the Union's evidence does not satisfy the standard at issue here. Indeed, Local 324 cannot successfully argue that it's evidence will change the result because its position on the merits—that the petition should be dismissed—prevailed. Local 324 claims that its new evidence "dramatically fortifies the reasoning and conclusions of the Regional Director." Union Mot. at 3. Fortification of the RD's decision, however, is not a change in the outcome of the proceeding and is an insufficient reason to reopen the record and further delay processing this case. *See FedEx Freight, Inc.*, 362 NLRB 762, 762 n.1 (2015) (denying a motion to reopen the record to "clarify" the record). Even if new details emerged in the hearing, the Regional Director assumed for the purposes of her decision that the

alleged ULPs—including an unlawful pay raise—occurred. Further, the testimony sought to be admitted is nothing more than uncorroborated testimony that is neither the subject of a Complaint nor a finding in an ALJ's decision.

If the Board overturns the Regional Director's dismissal and determines further facts are required in this matter, it can remand for a hearing so all parties can present evidence as Mr. Kent requested. Here, no one had a chance to present evidence as no hearing has ever been held. It would be fundamentally unjust for the Board to allow one party to unilaterally dictate the contents of the record, particularly where (as here) Mr. Kent specifically requested and was denied the ability to present evidence at a hearing. Pet'r's Br. on the Merits, Ex. 2, ALJ Dec. & Order at 8.

D. The Union's Motion impermissibly addresses matters that should have been addressed under Section 102.67(h).

The Board will not entertain a "motion for reconsideration, for rehearing, or to reopen the record . . . with respect to any matter which could have been but was not raised pursuant to any other section of these Rules." NLRB Rules & Reguls. § 102.65(e)(1). Almost all of Local 324's "analysis" in its Motion is actually an argument in support of the Regional Director's dismissal. *See* Union Mot. at 3–6. Local 324 could have, but did not, raise such arguments in a brief on the merits in opposition to Mr. Kent's Request for Review under Section 102.67(h). Local 324 had ten business days after the Board granted review on February 8, 2021 to file such a brief. NLRB Rules & Reguls. § 102.67(h). Yet, the Union failed to file a brief, instead waiting twenty-four days to argue in support of its position under the guise of a "motion to reopen the record." Lacking a timely filed opening brief, Local 324 would not be permitted to file a reply brief, which requires special leave of the Board. *Id.* ("No reply briefs may be filed except upon special leave of the Board.").

The Board should recognize Local 324's blatant disregard of the rules, and deny its motion to reopen the record. Local 324 could have filed a brief addressing the Board's grant of Mr. Kent's Request for Review by February 22, 2021, but it did not do so.

CONCLUSION

The Union's Motion to Reopen the Record swiftly should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on the Merits was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 10th day of March, 2021:

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